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# PROTECTED ACTIVITIES: How Far Can The Union Rep Go?

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# The Federal Service Labor- Management Relations Statute

- 5 U.S.C. Chapter 71
  - Governs collective bargaining in federal agencies
  - Sets forth rights and obligations
  - Section 7101: Findings and Purpose
    - “Labor organizations and collective bargaining in the civil service are in the public interest.”

# Employees' Rights

- Section 7102
  - “Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”
    - Act for a labor organization in the capacity of a representative and present the views of the labor organization, and
    - Engage in collective bargaining

# What Activity is Protected?

- Act for a labor organization in the capacity of a representative and present the views of the labor organization
  - Weingarten meetings
  - Grievance meetings
  - Formal discussions
  - Labor-management forums
  - Arbitrations

# What Activity is Protected?

- Engage in collective bargaining
  - Negotiate a term contract
  - Negotiate over changes in conditions of employment
  - Negotiate a memorandum of understanding

# Unfair Labor Practices

- Section 7116(a): It is a ULP for an agency:
  - (1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
  - (2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

# Why is “protected activity” protected?

- Collective bargaining is in the public interest
- Without protection, management could target union representatives or employees exercising their rights under the Statute

# Losing the Protection

- “Protected activity” will no longer be protected when the union representative engages in “flagrant misconduct” **OR** when his or her conduct “otherwise exceeds the boundaries of protected activity.”
- Once the union representative engages in flagrant misconduct, management may take action against the representative for his or her actions.



# Official Capacity

- In determining whether to apply the flagrant misconduct doctrine, the FLRA examines whether the employee was acting in his or her official union capacity at the time of the allegedly protected activities.
  - U.S. Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland, 42 FLRA 22, 23-24 (1991)

# Official Capacity

- **FLRA Case**
  - Union VP interrupts office birthday celebration, loudly saying it was “a blatant and ridiculous display of management’s power.” Also calls the celebration “disgusting” and says management is “making a fool” of her.
  - Later that day, while talking to a non-employee police officer, Union VP loudly complains about the dress code saying that management had “no right to determine what staff should wear” and calls a manager “ridiculous.” Comments are overheard by other employees and the VP’s supervisor.
- **Was she acting in her official capacity?**
  - SSA, Somerville, Mass., 64 FLRA 599 (2010)

# Flagrant Misconduct

- The conduct loses its protection if flagrant misconduct is established.
- Once the conduct loses its protection, management can discipline the union representative for the misconduct.
- If flagrant misconduct is not established, management commits a ULP by taking disciplinary action against the union representative.

# Flagrant Misconduct

- Determining whether the union representative engaged in flagrant misconduct involves balancing the employee's right to engage in protected activity against the employer's right to maintain order and respect for its supervisory staff.
- The employee's right to engage in protected activity "permits leeway for impulsive behavior."
  - DOD, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71, 80 (1985).

# Flagrant Misconduct

- Protected activity remains protected unless it is found to be “so violent or of such serious character as to render the employee unfit for further service.”
  - *Dreis v. Krump Mfg. Co., Inc v. NLRB*, 544 F.2d 320, 329 (7<sup>th</sup> Cir. 1976) (cited with approval in *U.S. Dept. of Veterans Affairs Medical Center, Jamaica Plain, Mass.*, 50 FLRA 583, 587 (1995))

# Flagrant Misconduct

- Remarks or conduct that are of such an “outrageous and insubordinate nature” as to remove them from the Statute’s protection constitute flagrant misconduct.
  - Naval Facilities Engineering Command, 45 FLRA 128, 156 (1992)

# Flagrant Misconduct Factors

1. The place and time of the subject matter involved
2. Whether the outburst was impulsive or designed
3. Whether the outburst was in any way provoked by management
4. The nature of the intemperate language and conduct

- Dep't of the Air Force, Grissom Air Force Base, 51 FLRA 7, 11 (1995)

# Flagrant Misconduct Factors

- Factor 1: The place and time of the subject matter involved
  - Facts: During negotiations, a union rep yells at management's chief negotiator and uses profanity.
  - Facts: A union rep yells at a manager and uses profanity in the building lobby where members of the public are present.



# Flagrant Misconduct Factors

- Factor 2: Whether the outburst was impulsive or designed
  - Facts: As he reads his oral presentation of a step 3 grievance, a union rep refers to the step 2 grievance official as an [expletive] disingenuous liar.
  - Facts: At the conclusion of a three-day labor-management forum meeting, a union rep receives a notice that management intends to conduct a RIF and calls the Chief of LR an [expletive] disingenuous liar.

# Flagrant Misconduct Factors

- Factor 3: Whether the outburst was in any way provoked by management
  - Facts: During negotiations, management's chief negotiator repeatedly challenges the union's chief negotiator, asking "What are you gonna do about it?" The union representative unleashes a barrage of profanity and storms out.
  - Facts: A manager begins a grievance meeting by inviting the union representative to start his presentation. The union representative unleashes a barrage of profanity and storms out.

# Flagrant Misconduct Factors

- Factor 4: The nature of the intemperate language and conduct
  - Facts: During negotiations, the union's chief negotiator calls a manager an "f'ing idiot."
  - Facts: During negotiations, the union's chief negotiator calls a manager a racially derogatory term.

# Flagrant Misconduct Factors

- The Authority draws the line at racial epithets, calling them flagrant misconduct.
  - Rationale: There is a clearly expressed public policy against racial discrimination in the workplace and racial stereotyping tends to undermine that policy. Therefore, racial epithets do not fall within the protections of the Statute.
    - Veterans Administration, Washington, DC and Veterans Administration Medical Center, Cincinnati, Ohio 26 FLRA 114 (1987)

# Flagrant Misconduct Factors

- Fact-based analysis
  - Was the outburst brief or prolonged?
  - What was the tone of voice?
  - Was there any physical contact or a threat of violence?
    - A physical response is often considered to be beyond the limits of acceptable behavior, but there is no *per se* rule that physical touching is beyond the Statute's protection

# Flagrant Misconduct Factors

- Congress intended in both the private and federal sectors to permit uninhibited, robust, and wide open debate, reaching beyond the strictly civil to encompass even language properly described as intemperate, abusive, or insulting.
  - U.S. Dep't of Transportation, Federal Aviation Administration, Washington, DC, 64 FLRA 410 (2010)

# FLRA Case Example

- Facts: Union representative at a VA hospital suspended for remaining on the telephone for 2 minutes to discuss union business while a life-threatening situation needed his attention.

# FLRA Case Example

- Authority: conduct is unprotected.
  - Rationale: Nothing in the Statute permits an employee faced with an emergency to delay obeying a supervisor's order in order to discuss union business.
    - VAMC, Birmingham, Alabama, 35 FLRA 553 (1990)



# FLRA Case Example

- Facts: Union representative was distributing copies of ULP charges to supervisors named in the charges. One supervisor ordered him to leave and called Security but the union rep refused to leave. Management issued a letter of reprimand.

# FLRA Case Example

- Authority: conduct is protected.
  - Rationale: Refusal to leave the work area was insubordinate but was not so outrageous as to lose protection of the Statute. Nothing in the record suggests that the union rep was impolite, antagonistic, or disrespectful.
- U.S. Air Force Logistics Command, Tinker AFB, Oklahoma City, Oklahoma, 34 FLRA 385 (1990)

# When Considering Discipline

- Is the activity protected union activity?
- Was the union rep acting in an official capacity?
- Did the incident occur in the heat of negotiations?
- Was the union rep physically violent or threatening?

# When Considering Discipline

- Was the union rep's language racially offensive?
- Was the language or conduct outrageous?
- Who heard or saw the incident?
- What harm or disruption was caused?

# More Case Examples

- Facts: Union rep approaches supervisor to discuss staffing level on upcoming shift, a matter of concern to the union and covered by the CBA. Supervisor says that a staffing decision has not yet been made. Union rep is dissatisfied with any delay in the decision, and says “f\_\_ you, I don’t give a f\_\_\_\_\_.” Supervisor has the rep escorted from the building and placed on admin leave.

# More Case Examples

- Authority: No flagrant misconduct so the conduct is protected.
- Rationale: Union rep spoke in normal tone of voice, no other employees heard the profanity, utterance was made in frustration and was not designed or planned. Statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth.
- Dissent by Member Beck
  - U.S. Dept. of Transportation, Federal Aviation Admin., Washington, DC, 64 FLRA 410 (2010)

# More Case Examples

- Facts: Union steward suspended for 3 days for 2 incidents
  - #1: Telling HR Specialist through clenched teeth and with balled fists, “You better not mess with me! I know my rights,” refusing to leave when asked, then following closely behind the HR Specialist and threatening to file a ULP and saying the HR Specialist better learn the parties’ master agreement.
  - #2: Union rep learns that his third-line supervisor asked another supervisor where the rep was going. Union rep later asks if third-line supervisor was looking for him and is told the supervisor just wanted to know his whereabouts. Rep says that third-line supervisor had no business asking where was, gets loud, unruly, upset, and belligerent, and calls the supervisor an “Uncle Tom.”

# More Case Examples

- Authority upholds the Arbitrator: The rep's conduct exceeded the bounds of protected activity and the Union has not shown that the Arbitrator erred in upholding the suspension.
- Rationale: HR Specialist felt threatened and intimidated. An observer even told the HR Specialist at the time of the incident that she thought the Specialist "would be at least a year in the job before she got beat up." Racial slurs are inappropriate in the workplace.
  - U.S. Dept. of Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 63 FLRA 362 (2009)



# More Case Examples

- Facts: Union steward suspended for 14 days for sending email
  - Agency proposes to terminate bargaining unit employee. Union rep sends email to several individuals, including non-employees, saying that there has seemingly been a long, continuous road of retaliation, discrimination, and injury against the employee by her current supervisor. Also described an exchange between the employee and the supervisor as a blatantly and purposely humbling, racist, and unkind event.
  - Issue for arbitration: Whether the suspension was for just and sufficient cause?

# More Case Examples

- Arbitrator finds that the Agency proved its charge but deems the penalty excessive, reducing it to 7 days.
- Issue on appeal: Does the flagrant misconduct standard apply?
- Authority: Not where the issue before the arbitrator is whether there was “just cause,” and the Union waived any statutory claims. Therefore the claimed misapplication of that standard by the Arbitrator is not a basis for setting aside the award.
  - U.S. Dept. of Health and Human Services, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina, 65 FLRA 561 (2011)

# Remember...

- Union reps are allowed to be loud
- Union reps are allowed to be rude
- Union reps are allowed to be insulting
- Union reps are allowed to curse
- Union reps don't always have to follow the rules that everyone else has to follow